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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 158.

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. DONALD A. J. RAY,
Petitioner-Appellant,

vs.

WALTER B. MARTIN, as Warden of Attica State Prison, Attica, New York,
Appellee.

BRIEF ON BEHALF OF CATTARAUGUS COUNTY, APPELLEE IN CERTIORARI GRANTED OCTOBER 8, 1945, ON PETITION FOR CERTIORARI FILED JUNE 23, 1945, TO REVIEW JUDGMENT OF COUNTY COURT OF WYOMING COUNTY, NEW YORK STATE, AND THE DECISION OF THE COURT OF APPEALS OF THAT STATE UPON WHICH SAID JUDGMENT WAS ENTERED.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Facts of this Case.

On the 16th day of September, 1939 the body of Paul M. Balsiger was discovered in a car parked on Wildwood Avenue in the city of Salamanca, County of Cattaraugus and State of New York. Wildwood Avenue is a street which, in its entirety, lies within the corporate limits of the city of Salamanca. Paul M. Balsiger was a resident of the city of Bradford, Pennsylvania, and a white man, who had never

been enrolled as a member of any of the New York Indian Tribes, which fact is stipulated.

By an indictment handed up to the Supreme Court for the County of Cattaraugus at the September 1939 term, Donald A. J. Ray was charged with the murder of Paul M. Balsiger in two counts. The first count charging murder in the first degree from a deliberate and premeditated design to effect the death of the decedent and the second count charging murder in the first degree in that Donald A. J. Ray did shoot and kill Paul M. Balsiger with a loaded firearm when he, the said Donald A. J. Ray, was engaged in the commission of a felony, that is, the crime of robbery.

Upon this indictment defendant Ray was brought to trial in the Supreme Court in Cattaraugus County on the 4th day of December, 1939 and thereafter on the 11th day of December, 1939, the count of premeditated murder having been dismissed, Ray was found guilty of murder on the felony count and was sentenced on the 15th day of December, 1939 to be imprisoned in the State Prison at Attica, New York for the term of his natural life.

It appears from the record taken in open court at the time of the defendant's conviction that he was a citizen of the United States and by his own affidavit in the moving papers applying for the writ of habeas corpus, he states that he is a white man.

On June 28, 1940 the conviction of the defendant Ray was affirmed by the Appellate Division of the N. Y. Supreme Court. Subsequently an application for leave to appeal to the N. Y. Court of Appeals was denied. The question raised on this application involved points of fact and law concern-

ing murder by premeditation and felony murder and have no bearing upon the jurisdictional question.

At no time has the defendant, prior to his application to the Federal Court for the Western District of New York, raised the question of the jurisdiction of the State of New York to prosecute the charges brought against him by the indictment aforesaid, and nowhere in the record does it appear that the defendant ever questioned the jurisdiction of the State of New York.

Ray, the defendant above-named, made application under date of March 31, 1943 (R. 4), to the United States District Court, Western District of New York to be heard on a motion for the granting of a writ of habeas corpus.

On the 26th day of April, 1943, arguments were presented by the petitioner, and in opposition thereto by the Attorney General of the state of New York on behalf of the Warden of Attica State Prison, by the United States Attorney for the Western District of New York and by the County of Cattaraugus.

An opinion of the Honorable John Knight, United States District Judge, filed July 19, 1943 (R. 7), denied the writ, on the ground that petitioner could not invoke jurisdiction of the District Court until he had exhausted his remedies in the state courts and secondly, that the Penal Laws of the State of New York governed the acts for which this defendant was convicted and that the Supreme Court of the State of New York had jurisdiction of the crime.

This decision was appealed to the Circuit Court of Appeals, where it was affirmed (R. 12) and thereafter the

matter was initially presented to the New York State courts by writ of habeas corpus (R. 3) sued out before the county judge of Wyoming County. The County Court having denied the writ (R. 20) and the denial having been affirmed by the Appellate Division (R. 35), an appeal was taken to the N. Y. Court of Appeals, which affirmed the previous order (R. 55). From this decision of the New York State Court of Appeals this certiorari has been granted (R. 63).

Summary of Argument.

Point One will review the History of the Allegany Reservation upon which the crime was committed.

Point Two will show that the jurisdiction of the courts of the United States is not exclusive on this Reservation and therefore the New York State Courts have jurisdiction.

Point Three will suggest that the writ of habeas corpus is not a proper remedy in this case.

POINT ONE.

The sovereignty of the State of New York attaches to the lands of the Seneca Indians comprised within the boundaries of the State of New York.

The nature of the Indian title to lands on this continent was established by the system of public law adopted by European nations regarding their possessions here. It became the recognized principle that discovery followed by possession, vested in the sovereign by whose subjects the discovery was made the absolute title to the soil of the lands within the limits of the discovered territory, subject, how-

ever, to the right of the occupation by the Indian tribes, which could only be extinguished by their voluntary consent, unless forfeited under the laws of war.

The title of the crown was subject to grant, but a grant from the crown only conveyed the fee, subject to the right of Indian occupation and when that was extinguished under the sanction of the crown, the possession then attached to the fee and the title of the grantee was perfected. These general principles were announced by Chief Justice Marshall in the case of Johnson vs. M'Intosh (8 Wheaton 543) which has ever since been regarded as a sound exposition of the nature of Indian rights.

By the Declaration of Independence the colonies became sovereign states and were so acknowledged by the Treaty of Peace of 1783 and Great Britain by that Treaty "relinquished all claims to the *government, property* and *territorial* rights" within the several colonies. It is the received opinion that the colonies succeeded to the rights and title of the crown to all the unclaimed lands within their respective boundaries, with the exclusive right to extinguish by purchase the Indian title, and to regulate dealings with the Indian tribes. "There was no territory in the United States," said Justice Johnson in Harcourt vs. Gaillard (12 Wheaton 523) "that was claimed in any other right than that of one of the Confederated States; therefore, there could be no acquisition of territory made by the United States distinct from or independent of some one of the United States."

A controversy had arisen between the colonies of New York and Massachusetts, prior to the Revolution, respecting the right of sovereignty and jurisdiction over a large territory within the chartered limits of the province of New

York, which was claimed by Massachusetts to be included within the limits of the earlier charter of the colony of Massachusetts Bay.

This dispute was still unsettled after the Articles of Confederation were adopted and was then brought by Massachusetts to the attention of the Congress of the Confederacy, by petition praying for the appointment of commissioners for the settlement of its claim under the provisions of Article Nine of the Articles of Confederation. Congress was proceeding to appoint commissioners, when further action on its part was arrested by the appointment, by voluntary agreement between Massachusetts and New York State, of commissioners to adjust the controversy.

These commissioners in behalf of their respective states entered into a compact on the 16th day of December, 1786 whereby *Massachusetts ceded to the state of New York the right of government, sovereignty and jurisdiction over the whole territory in dispute*, and New York ceded to Massachusetts the right of preemption of the soil and to extinguish the Indian title to about six million acres of land in the western part of the state of New York, described in the treaty, Massachusetts surrendering to New York all claims to any other territory therein. By the Ninth Article of this Compact, Massachusetts was authorized to treat with the native Indians for acquiring the right of soil in the territory to be ceded to Massachusetts.

The Tenth Article is as follows:— "Tenthly, the Commonwealth of Massachusetts may grant the right of preemption of the soil of any part of said lands and territories to any person or persons, who by virtue of such grant, shall have good right to extinguish by purchase the claims of the

native Indians, providing, however, that no purchase from the native Indians by such grantees shall be valid, unless the same shall be made in the presence of or approved by a superintendent to be appointed for such purpose by the Commonwealth of Massachusetts, and having no interest in such purchase, and unless such purchase shall be confirmed by the Commonwealth of Massachusetts."

This Compact, after the adoption of the Constitution of the United States, was formally ratified and approved by Congress, whose consent was made necessary both by the Articles of Confederacy and by the Federal Constitution to any Compact between the states. In 1791 the State of Massachusetts conveyed its title and interest in and to above five million acres of land, ceded to it by the treaty of 1786, subject to the Indian right, to Robert Morris of Philadelphia, who subsequently conveyed the greater portion to persons constituting the Holland Land Company. This conveyance was accompanied by an agreement by Morris to extinguish the Indian rights.

On the 15th of September, 1797 at a public council of the Seneca Indians held at Geneva, in the County of Ontario, the Indians conveyed to Robert Morris all the lands embraced in this purchase from Massachusetts *excepting certain Indian reservations.* It is recited in the conveyance that it was made "at a treaty held under the authority of the United States by the Honorable Jeremiah Wadsworth, a Commissioner appointed by the President of the United States, to hold the same." There was also present at that treaty a commissioner on the part of Massachusetts, *This treaty was between the Indians and Morris under the supervision of the Commissioner named.* It was not a treaty between the United States and the Indians. This grant is the

origin of the title derived from the Indians to the lands known as the Holland Purchase and the Morris Reserve in this state.

Among the reservations excepted by the Seneca Indians was a tract containing 42 square miles lying on each side of the Allegany River and extending from the Pennsylvania line northeastward about 25 miles. It is upon this tract now known as the Allegany Reservation that most of the corporate limits of Salamanca lie and within the boundaries of which tract in the city of Salamanca the crime for which Donald A. J. Ray was convicted was perpetrated.

There was also a controversy between the states and the United States as to the unclaimed lands extending indefinitely westward far beyond the limit of settlement, and whether the colonial charter could be fairly construed to include these indefinite regions, which controversy, however, was happily compromised by cessions made by six of the states to the United States of territory claimed by them, commencing with that of New York on March 1, 1781 and including the memorable cession of the Northwest Territory by Virginia in 1784. (See Clark vs. Smith, 13 Peters 195; Fletcher vs. Peck, 6 Cranch 142.) This was the beginning of the acknowledged territorial possession of the government of the United States, subsequently largely increased by purchases from France and Spain.

The original states before and after the adoption of the Federal Constitution assumed the right of entering into treaties with the Indian tribes for the extinguishment and acquisition of their title to lands within their respective jurisdiction. They exercised the power, which had before been vested in the Crown, to treat with the Indians, and

this they did independently of the government of the United States. This was notably true of the State of New York. Laws were enacted from time to time by the Legislature of the state authorizing treaties with the Indians. In all, more than 30 treaties were made by the state and various tribes, independently and without the investigation of the government of the United States. (Collection of State Treaties, Assembly Document 1889 Report on Indian Problems.)

These treaties were generally negotiated by a Commissioner appointed by the Legislature acting in conjunction with the governor of the state. It appears that on two or three occasions a Commissioner of the United States was present when treaties were made but in all cases the state and not the United States was the contracting party with the Indians. The treaties were in no sense treaties made by the President and Senate of the United States. Indeed, with reference to the extent of the participation of the United States, in a conveyance of August 31, 1826, which dealt with the Allegany and Cattaraugus reservations, the same was submitted to the Senate, although it was deemed a useless ceremony, the President approving it only, the Senate saying on receiving the communication from the President that the matter had been referred to the Committee on Indian affairs and afterwards on it having been reported back to the Senate, that body refused to ratify it, passing an explanatory resolution as follows:— "Resolved that by the refusal of the Senate to ratify the treaty with the Seneca Indians it is not intended to express any disapprobation of the terms of the contract entered into by the individuals who are parties to that contract, but merely to disclaim any power over the subject matter."

The particular construction given by the State of New York to the Federal Constitution as shown by the numerous

treaties made by it with the Indian tribes and the recognition by the Federal authorities of their validity is very strong evidence that the clause in the Federal Constitution prohibiting the states from entering into treaties does not preclude a state having the preemptive right to Indian lands from dealing with the Indian tribes directly for the extinguishment of the Indian title. Such a dealing is not a treaty in the constitutional sense and is not inconsistent with the exercise of the United States of its general jurisdiction in the protection of the Indians in their right of occupation in their lands.

The remark of Justice McLean in his opinion in Worchester vs. State of Georgia (6 Peters 580) that "under the constitution no state can enter into any treaty, and it is believed that since its adoption no state under its own authority has held a treaty with the Indians" was true as referring to treaties for lands owned by the general government, but if intended to have a broader scope, seems opposed to the facts of history. The United States by virtue of the cession made by the states was the owner of a large territory in possession of the Indian tribes with the exclusive right of preemption.

Subsequent to the cession by the states to the United States of these western lands, the State of New York and the other states of the thirteen original ones were at the same time owners of lands in the occupancy of the Indian tribes within their respective limits and had the exclusive power to extinguish the Indian title thereto. The United States could not impair the title of the states nor purchase the lands nor authorize any purchase without the consent of the state within which they were situated.

Having no original right of sovereignty, the United States at no time without the consent of a state could through their commissioner or representative present at the making of any treaty or compact reserve to themselves the right of sovereignty, government or jurisdiction, since there existed in the United States no inherent power other than that granted by the Third clause of Section 8 of Title 1 of the Federal Constitution which provided for the regulation of commerce among the several states and with the Indian tribes.

The inherent right of sovereignty, jurisdiction and government over the lands upon which the Allegany reservation is situate, lay in Massachusetts and New York and that right, although in controversy between these two states, was adjusted by the cession of the right of sovereignty, government and jurisdiction to New York by Massachusetts which cession was fully approved by the Congress acting under the Articles of Confederation and subsequently by the United States under the constitution. There is no indication in the records that New York has ever yielded these rights of sovereignty and government. The United States never having had a preemptive right to any of the lands in question in western New York could not set aside any of these lands for the Seneca Indians; nor did the United States ever set such lands aside for the Seneca Indians, for the lands were reserved by the Seneca Indians to their own use in the agreement entered into by the Seneca Nation and Robert Morris in the presence of and with the approval by the United States Commissioner, Jeremiah Wadsworth, the said Commissioner reserving no rights to the United States at the time.

POINT TWO.

New York having exercised her sovereign power within the Seneca Reservation, with the acquiescence of the Indians and the Federal government, jurisdiction of the United States over lands of the Seneca Indians is not exclusive.

The application for a Writ of Habeas Corpus in the instant case alleges that the crime for which the defendant was indicted and convicted is one of the crimes covered by Section 452 of Chapter 11, Title 18 of the United States Code; that it is also under Subdivision 3, Section 451 of the same Title and Chapter of the United States Code.

Section 452 deals with murder in the first and second degree and under the annotations to that section it is indicated that a felony murder would fall under the provisions of this Section.

Subdivision 3 of Section 451 provides that the crimes and offenses defined in Chapter 11, Title 18 of the United States Code "shall be punished as herein prescribed when committed within or on any lands reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dock yard, or other needful building."

It is possible that the Federal courts have and will take jurisdiction for the prosecution of crimes on Indian reservations in three different ways.

First, under the provisions of Section 548, Chapter 15 of Title 18 of the United States Code, an Indian committing any one of the seven enumerated major crimes "on the person or property of another Indian or other person within the boundaries of any state of the United States or within the limits of any Indian reservation shall be tried * * * as are all other persons committing said crimes within the exclusive jurisdiction of the United States."

That the state of New York does not have jurisdiction of an Indian living in the tribal relation who has committed one of these major crimes within the boundaries of his tribal reservation is settled law in New York. People *ex rel,* Cusick vs. Daley, 212 N. Y. 183. If the facts of any case bring the prosecution thereof within the provisions of the aforementioned Section 548 admittedly the Federal government has exclusive jurisdiction. In the instant case neither the defendant nor decedent was an Indian so further consideration of Federal jurisdiction by virtue of this Section is not necessary.

Second, Section 217, Chapter 6, Title 25 United States Code provides that the general laws of the United States as to the punishment of crimes committed within the sole and exclusive jurisdiction of the United States except the District of Columbia, shall extend to the Indian country. There is a further exception relating to crimes, the punishment of which is expressly provided for in this title. It is submitted that at no time has the Allegany reservation, located in western New York even been Indian country and this contention is supported by the history of the acquisition of these lands and the reservation of certain areas for the use of the Indian tribes. Furthermore, the Benson case, Benson vs. U. S., 44 Fed. 178, which was prosecuted under this

very section, decided that the city of Salamanca did not lie in Indian country and that the Courts of the state of New York and the laws that were therein enforced, had jurisdiction over and application to the liquor traffic as regulated by New York laws within the city of Salamanca located on the Allegany reservation although there was a violation of a Federal provision if the crime occurred in Indian country.

The term "Indian Country" embraces all lands within the limits of the United States to which the Indian title has never been extinguished, except that which lies within the exterior geographical limits of a state, and which was not excepted from the jurisdiction of that state at the time of its admission into the union (*Ex parte* Kan-gi-Shunca, 109 U. S. 556).

Third, Section 451 and 452, of Chapter 11, Title 18 of the United States Code under which the application for a writ is made, deals with areas over which the United States has exclusive jurisdiction. The historical background of these areas in which the city of Salamanca lies indicates that the United States has never exercised exclusive jurisdiction over that portion of the Allegany Indian reservation which lies within the limits of the city of Salamanca. The Benson case indicates that the Federal government does not have the power to exercise jurisdiction because this was not Indian country, and it was conceded that New York would have the power and should exercise jurisdiction and the control of the liquor traffic in what was then the village of Salamanca.

It was conceded that New York would have the power and should exercise jurisdiction over the reservation inhabited by the Seneca Nation in the case of New York vs.

Dibble, 21 Howard 366. In the Dibble case, under the provision enacted by the New York State legislature to secure to the Indian inhabitants thereof their rightful occupancy of the Seneca reservations, a summary proceeding for the removal of certain white persons who had encroached within the Indian reservation under color and title purported to be obtained from the Ogden Land Company, which had and still probably held the preemptive rights to these lands, was instituted by a County Judge and a warrant issued to a Sheriff for the removal.

The white encroachers challenged the power of the County Judge to issue a warrant in a summary proceeding on the theory that they were deprived of a trial by jury and therefore of due process.

The actions of the County Judge were upheld in all the courts of New York state and the question was taken to the United States Supreme Court, where it was held that the State of New York had a right to exercise its sovereign powers within these Indian nations so far as it was necessary to protect the rights and property of Indians in this state and to preserve the public peace. It is noted that even at this date, in the late fifties of the last century, the Indians were directed to seek redress in the courts of New York State and not those of the Federal government when they were being wronged.

This was a logical conclusion since some ten years before the Seneca Nation, being the inhabitants of the Allegany and Cattaraugus reservations, had on December 4, 1848 adopted a new constitution and prayed the State of New York and the United States to approve the same and that constitution was subsequently approved by the two governments. The government of the United States and the

state of New York were asked "to aid us in providing laws under which life shall be possible."

Section 19 of that constitution provides: "The laws passed by the legislature of the state of New York for the protection and improvement of the Seneca Nation of Indians, and also all the laws and regulations heretofore adopted by the Chiefs and regular council assembled shall continue in full force and effect as heretofore except so far as they are inconsistent with the provisions of this constitution."

Section 4 provides: "The jurisdictional power shall be vested in three peacemakers on each reservation; any two of whom have power to hold courts, subject to an appeal to the council and *to such courts of the state of New York as the legislature thereof shall permit.*"

Under the provisions of this constitution the Indians have had access to the courts of the state of New York and have availed themselves of this access and New York state has exercised the jurisdiction over the internal affairs of the Indians living in the tribal relation upon these reservations.

Seneca Nation of Indians vs. Christie, 126 N. Y. 122.
Hatch vs. Luckman, 155 A. D. 765.
Jimeson vs. Pierce, 78 A. D. 9.
United States vs. Waldow, 294 Fed. 111.

In United States vs. Waldow (294 Fed. 111) one Pierce as relator, sought a writ of Habeas Corpus to discharge himself, an Indian, held under a state process. His imprisonment was the result of the following facts:

A Seneca Indian of full blood residing on the Cattaraugus reservation, named Patterson, died possessed of house and lands situate on that reservation. His widow was a white woman and he left a Last Will and Testament naming her executrix, which Will was admitted to probate in the Erie County Surrogate's Court and thereupon the Seneca Indian, named Pierce, began suit in the Peacemakers court in the Cattaraugus County Indian Reservation, alleging that Patterson's widow and children were not members of the Seneca Nation and so not entitled to inherit the real estate of the deceased and Pierce obtained Letters of Administration under the tribal customs.

The widow appeared in the Peacemakers court and objected to its jurisdiction but that court declared that the lands be surrendered to Pierce and the widow vacate. Upon application of the widow the Supreme Court of New York granted an alternative writ of prohibition by which the Peacemakers' court was required to show cause why the writ should not be made absolute. The Peacemakers requested a continuance and upon the return date defaulted and the writ was duly issued.

Thereafter, upon showing that the Peacemakers court disobeyed the writ, the reservation marshal who under his authority threatened to carry out the decree of dispossession, and Pierce, one of the claimants, were held in contempt and committed to Erie County Jail. In execution of the commitment, the Sheriff of Erie County arrested both the Reservation Marshal and Pierce while they were temporarily in the Federal Building at Buffalo invoking, as wards of the Nation, the aid and protection of the United States Attorney. Under their apprehension they immediately applied to the District Court of the Western District of New York for a writ of Habeas Corpus. The writ

was dismissed upon the merits, on the grounds that the State of New York has authority to enact laws for the protection of the civil rights as to the internal affairs of the Indian residents on the Cattaraugus and Allegany reservations, which authority it has exercised with the acquiescence of the Indians and the Federal government since 1849.

It is apparent then that within the boundaries of the Cattaraugus and Allegany reservations New York has exercised jurisdiction of its courts in many instances with the consent of the Indians and without the interference of the Federal courts. In the absence of congressional legislation a Federal court will not interfere with the administration of such laws by the courts of the state. Even in western states carved from United States territory where attempts were made to invoke federal jurisdiction under the same statutory provisions as are sought in the instant case, that is, that the Federal government should assume jurisdiction because the territory was within the exclusive jurisdiction of the United States, it has been held that federal jurisdiction did not lie, for it was said that the state, by its admission into the union by Congress, *upon an equal footing with the original states* in all respects whatsoever, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits including the reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States.

United States vs. McBratney, 104 U. S. 621.

It is to be noted that in this case that the United States once held and exercised exclusive jurisdiction over the territory in question but was divested of such jurisdiction when the state was admitted to the Union *upon an equal footing with the original states in all respects whatsoever.*

The McBratney case was cited in the case of Draper vs. United States, 164 U. S. 640 in which case Draper, who had been convicted in Federal Court of the crime of murder alleged to have been committed on the Crow Indian reservation in the state of Montana, contended that the Federal Courts had no jurisdiction which contention was supported by the United States Supreme Court.

Assuming that there never had been enacted a Statute of 1875 (18 Stat. 330) and the Amendments of 1890 (29 Stat. 558) providing for the village, now the city of Salamanca, and the several incorporated villages such as Vandalia, Carrollton and Red House on the Allegany Reservation, and assuming further that Section 71 of the New York Indian Laws had never been passed in furtherance of the Statute of 1875, since the United States has never exercised or purported to reserve to itself the power to exercise exclusive jurisdiction over either of these two reservations, and since by the very terms of the section under which this allegation is made, exclusive jurisdiction is necessary to bring the matter to a federal court, this third instance under which federal jurisdiction might attach fails of qualification in the instant case.

The contention that the provisions of Section 71 of the Indian Law, Consolidated Laws of New York, are unconstitutional when they are sanctioned by the Federal government after being requested by the Indians is without weight. Neither the Seneca Indians nor the United States has challenged the jurisdiction of the Salamanca City Court (New York Session Laws of 1913, page 507) to punish *Indians* for petty crimes committed within the corporate limits of the city of Salamanca and if applicant's premise that Section 451 of Chapter 11 of Title 18 of the United States Code is true regarding federal jurisdiction of murder in

Salamanca, the corollary, that the provisions of Section 468 of the same Chapter and title should bring the petty crimes within the same federal jurisdiction must follow. The federal authorities have never interested themselves in the prosecution of either white man or Indian for petty crimes committed in Salamanca, prosecuted by its city court and punished by imprisonment in the Cattaraugus County Jail. Exclusive jurisdiction of the United States has never attached to the lands within the Allegany reservation and particularly that portion lying within the city of Salamanca.

The Forness case (U. S. vs. Forness, 125 Fed. 2nd, 928), cited by the appellant as his principal authority, was based on the false assumption that the Allegany Reservation comprised "lands granted by the United States to the Indians." As has been shown, the land in the City of Salamanca was never claimed or owned by the United States. The title to this land was in the colonies of Massachusetts and New York before the Constitution was adopted and has been in the States of Massachusetts and New York and their grantees ever since that time.

POINT THREE.

The writ of habeas corpus cannot be made use of as a writ of error.

The affidavit of counsel in support of the application for the writ of habeas corpus states "that an investigation of the record of the case reveals that at no time was the jurisdiction of the Supreme Court of the state of New York challenged in any of the proceedings of the Supreme Court of the State of New York" (R. 6).

A state court of original jurisdiction which has the parties before it may enforce and protect rights secured by the constitution and the laws in pursuance thereof.

U. S. vs. Waldow, 294 Fed. 111.
Robb vs. Connelly, 111 U. S. 637.
Ex Parte Royall, 117 U. S. 248.
Eaton vs. West Virginia, 91 Fed. 760.

POINT FOUR.

The decision of the County Judge should be affirmed.

Respectfully submitted,

CHARLES E. CONGDON,
Assistant District Attorney for the County of Cattaraugus,
Salamanca, N. Y.